

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding lands to be proper for regional selection and approving those lands for patent. AA-55021.

Affirmed.

1. Alaska: Alaska Native Claims Settlement Act -- Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc., amendment requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

2. Alaska: Alaska Native Claims Settlement Act -- Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is a prerequisite to selection of land by a Native village.

APPEARANCES: William L. Estelle, Esq., and Jacquelyn A. Luke, Esq., Anchorage, Alaska, for Bristol Bay Native Corporation; Robert S. Spitzfaden, Esq., Juneau, Alaska, for Paug-Vik, Inc., Ltd.; Mark Rindner, Esq., and Russell L. Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

Bristol Bay Native Corporation (BBNC) and Paug-Vik, Inc., Ltd. (Paug Vik), have appealed a May 14, 1985, decision of the Alaska State Office, Bureau of Land Management (BLM), which found Naknek Recreational Site No. 1 to be proper for acquisition by Cook Inlet Region, Inc. (CIRI), and which approved the land for patent pursuant to section 14(e) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(e) (1982). The land which is the subject of this appeal is a 9.47-acre parcel on the Naknek River approximately 18 miles southeast of the village of Naknek, which had been in use by the U.S. Air Force as a recreational area, having in June 1965 been withdrawn by Public Land Order No. 3700, 30 FR 7899 (June 18, 1965), for use as a military recreation site. This site was declared surplus to Federal needs on February 13, 1980.

On December 18, 1971, Congress passed ANCSA section 11(a), which withdrew, by township, public lands in the vicinity of each Native village for selection by the Native corporation established by the village. 43 U.S.C. § 1610(a) (1982). Paug-Vik is the village corporation, formed pursuant to ANCSA, for the village of Naknek. BBNC is the regional Native corporation within whose territory the village of Naknek is located. Because the 9.47-acre parcel was within a traditional-use area which continues to be a prime recreational and fishing site, Paug-Vik opposes transfer of the parcel to CIRI on economic and cultural grounds, unless transfer of the Naknek parcel to CIRI be made subject to consent by Paug-Vik and BBNC. BBNC joins in this objection, arguing it must be allowed the power to consent to the conveyance before it can be made.

In 1974, pursuant to provision of ANCSA, Paug-Vik filed a selection application which included the Naknek River parcel and the land surrounding it. On June 16, 1977, the U.S. Air Force filed with BLM a notice of intent to relinquish the parcel. In 1980, the Naknek parcel was declared Federal surplus property by the General Services Administration. By decision dated August 6, 1982, BLM rejected Paug-Vik's selection application for the parcel for the reason that the tract had been exempted from section 11(a) withdrawal as "national defense" land. This decision was not appealed, and is therefore now a final Departmental determination of the matter.

On January 24, 1984, the parcel was placed in a pool of surplus lands available for conveyance to CIRI pursuant to section 12 of the Act of January 2, 1976, as amended, 43 U.S.C. § 1611 note (1982) (CIRI amendment) and section I.C.(2)(b) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area (CIRI agreement) (Exh. 1, BLM Answer). The CIRI agreement, negotiated to influence the passage of legislation concerning CIRI's ANCSA claims, was first submitted to Congress for approval on December 10, 1975, and, as later "clarified" on August 31, 1976, was "ratified as to the duties and obligations of the United States and the Region [CIRI], as a matter of Federal Law." Act of Oct. 4, 1976, P.L. 94-456, 90 Stat. 1934, 1935. In the CIRI agreement the Department agrees to convey lands to CIRI, some of which are outside the corporation's region. Under section I.C.(2) of the CIRI agreement, some of these out-of-region lands, referred to by the

parties as the "surplus property pool" are to be made available to CIRI for selection from surplus Federal property. Section I.C.(2)(b) of the CIRI agreement provides that some of the surplus property subject to selection by CIRI may be located "without the boundaries of the Cook Inlet Region." The Naknek parcel is property in this out-of-region category.

The CIRI agreement is ratified and substantially enacted into law by the CIRI amendment, section 12 of the Act of January 2, 1976, P.L. 94-204, 89 Stat. 1150. The CIRI amendment provides, at section 12(b)(6), that the consent of other Native corporations must be obtained in certain circumstances. 89 Stat. 1152. BLM obtained the concurrence of the State of Alaska and CIRI before placing the Naknek land in the selection pool but did not obtain the consent of either BBNC or Paug-Vik. On January 15, 1985, CIRI filed a selection application for the Naknek parcel. By decision of May 14, 1985, BLM determined to convey the land to CIRI.

Section 11(a) of ANCSA, 43 U.S.C. § 1610(a) (1982), provides that "lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4" are excepted from the statutory withdrawal. The Department has previously found that this provision of ANCSA operates to exclude "lands withdrawn or reserved for national defense purposes" from land conveyed to Native corporations under provision of ANCSA. See Tanacross, Inc., 4 ANCAB 173, 87 I.D. 123 (1980). Tanacross, decided by the Alaska Native Claims Appeals Board (ANCAB), 1/ posed the question whether land withdrawn for pipeline terminal facilities for the U.S. Army was subject to selection by a Native corporation; that is, whether such property constituted "public lands" within the meaning of ANCSA section 3(e), 43 U.S.C. § 1602(e) (1982), and was therefore subject to selection by Native corporations.

In Tanacross ANCAB found it unnecessary to construe the provisions of ANCSA section 3(e), holding military lands were altogether excepted from the operation of ANCSA. Id. at 204-05, 87 I.D. at 137-38. ANCAB then went on to foreclose the possibility that land withdrawn for "national defense purposes" could later become subject to conveyance under provision of ANCSA. The Board held that, where land used for an Army pipeline facility was withdrawn throughout the entire period allowed for Native selection, there could be no subsequent Native selection, regardless whether the Army's actual use of the property had continued throughout the entire period of withdrawal. The Tanacross decision therefore concluded that property withdrawn for "national defense purposes" was simply not available for Native selection under ANCSA, under circumstances which are indistinguishable from these presented by this appeal.

The appeal by Paug-Vik directly challenges the correctness of this ANCAB ruling. Paug-Vik argues that conveyance of the Naknek land to CIRI is improper because BLM failed to determine, pursuant to ANCSA section 3(e),

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1/ Following the abolition of ANCAB by Secretarial Order in 1982, jurisdiction over appeals concerning land selection under ANCSA was delegated to this Board. See 43 CFR 4.1(b)(3)(i), 47 FR 26390 (June 18, 1982).

whether the Naknek River surplus property constituted "public lands" as defined by ANCSA. Paug-Vik also contends BLM erred when it failed to obtain Paug-Vik's consent to the Naknek camp's conveyance, because it was located within Paug-Vik's core township area, as such land is defined by ANCSA, and therefore subject to the consent limitation imposed by the CIRI amendment. BBNC joins Paug-Vik in this latter contention. Since the section 3(e) question raised by Paug-Vik was resolved in Tanacross, the issue on appeal, as framed by the parties, thus becomes whether the prior consent of both appellants was required before BLM could convey the Naknek parcel to CIRI. The Board concludes that such consent was not required.

[1] The CIRI agreement provides for the creation of several different categories of selection pools of land for the benefit of CIRI. Concerning lands located within the Cook Inlet Region the agreement recites:

The Secretary, in conjunction with the General Services Administrator, shall promptly identify and take the necessary steps by January 15, 1978, to create a selection pool which shall consist of all the following lands, within the exterior boundaries of the Cook Inlet Region, now in existence or hereafter coming into existence by January 15, 1978:

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(ii) Federal surplus property.

Id. section I.C.(2)(a)(ii). The agreement then goes on to permit surplus lands outside the Cook Inlet Region also to be placed into a selection pool for the benefit of CIRI:

The Secretary shall notify CIRI after any above-described lands have been placed in the pool. With the concurrence of CIRI, the State and any other concurrence that may be required under paragraph I.C.(1)(e) of this Document, the Secretary may, in his discretion, contribute to such pool properties of one or more of the foregoing categories from without the boundaries of the Cook Inlet Region. [Emphasis supplied.]

Id. section I.C.(2)(b). The language underscored above is seen by appellants to indicate the need for their consent to selection by CIRI of surplus property whether or not it was withdrawn for selection under ANCSA.

The terms of section I.C.(1) govern conveyance of Federal public lands withdrawn under section 11(a)(1) of ANCSA from townships nominated by CIRI outside its regional boundaries. Thus, section I.C.(1)(e) provides:

Prior to nomination of any township for Secretarial approval, CIRI shall obtain the consent of other Native Corporations where applicable, and a copy of such consent shall be attached to such nomination.

This language is geared to the consent language found in the CIRI amendment, section 12(b)(6) of P.L. 94-204, 89 Stat. 1151-1152.

The CIRI amendment, section 12 of P.L. 94-204, 89 Stat. 1150, appears to permit surplus Federal lands outside the exterior boundaries of CIRI to be conveyed to CIRI, without the prior consent of other affected Native corporations, where the lands have not been previously withdrawn pursuant to provision of ANCSA. Thus, section 12(b)(6) provides, pertinently, regarding lands outside CIRI's boundaries that consent from other Native corporations must be obtained under the following circumstances:

No lands outside the exterior boundaries of Cook Inlet Region shall be conveyed to the Region, unless, in the following circumstances, the consent of other Native Corporations is obtained:

(i) Where the township to be nominated is located within an area withdrawn as of December 15, 1975, pursuant to section 11(a)(1) of the Settlement Act, the Region shall obtain the consent of the Regional Corporation and Village Corporation affected.

(ii) Where the township to be nominated is located within an area withdrawn pursuant to section 11(a)(3) of the Settlement Act as of December 15, 1975, the Region shall obtain the consent of the Region in which the township is located.

There shall be established a buffer zone outside the withdrawals described in subparagraphs (i) and (ii) which zone shall extend one township from any such section 11(a)(3) withdrawal and one and one-half townships from any section 11(a)(1) withdrawal. Any nomination of a township within such zone shall be subject to the consent of the Region, or of the Village Corporation if adjacent to a section 11(a)(1) withdrawal: Provided, however, That the affected Regional Corporation may designate additional lands to be included by substitution in the buffer zone so long as the buffer zone location is no greater than two townships in width and the total acreage of the buffer zone is not enlarged. The affected Regional Corporation shall designate the enlarged buffer zone, if any, no later than six months following the passage of this Act. Any use or development by the Region of land conveyed under this paragraph shall give due protection to the existing subsistence uses of such lands by the residents of the area; and no easement across Village Corporation lands to lands conveyed under this paragraph shall be established without the consent of the said Village Corporation or Corporations.

Nothing in this consent provision appears to require BLM to obtain the consent of other Native corporations in situations where surplus lands not withdrawn for selection under ANCSA are concerned. Moreover, consent does not appear to be an issue because CIRI did not nominate a township in this case. Although it does not appear to be in any way ambiguous, the legislative history has been considered in light of appellant's arguments which seek to bring surplus property into the category of lands for which consent of other Native corporations is required by the CIRI amendment.

The legislative history of the provision explains away any doubts about its meaning. Thus, the House Report states, concerning this provision, that the consent language is to be construed so as to exclude from the operation of the consent requirement lands which are not subject to selection under ANCSA. The House Report concludes, concerning consent by other Native corporations, "Nor is it foreseen that the [consent] power would be exercised in withdrawals where the Region involved has no selection itself or where no villages within the Region have selections." H.R. Rep. No. 729, 94th Cong. 2d Sess. 32, reprinted in 1975 U.S. Code Cong. and Ad. News 2376, 2399. Since the Naknek campsite was not susceptible to selection by either of the Native corporations at any time during the 3-year period allowed to them for selection from 1971 to 1974, it was not subject to the consent provision of the CIRC amendment, under provision of section 12(b)(6) of that Act.

[2] This construction of the CIRC amendment is consistent with a recent decision by this Board, Sitnasuak Native Corp., 91 IBLA 86 (1986), which, while not directly on point concerning Native selections under the CIRC amendment, supports our conclusion that consent was not required in this case.

Sitnasuak found the availability of land for selection under ANCSA section 11(a) was a "prerequisite" to a Native selection claim. Id. at 90. If land was not previously withdrawn by ANCSA for such selection, Sitnasuak held there need be no determination by the Department concerning whether the definition of "public lands" found at ANCSA section 3(e) could apply to such lands. In this case also, following the same logic, since the Naknek land was never withdrawn for Native selection under ANCSA (because it was previously withdrawn instead for national defense purposes), it was excluded from the effect of ANCSA. Since the CIRC amendment to ANCSA does not require consent by Native corporations to selection of the Government surplus property under circumstances where the property was not withdrawn for selection under ANCSA, the same conclusion must be reached here.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness  
Administrative Judge

We concur:

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C. Randall Grant, Jr.  
Administrative Judge

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Bruce R. Harris  
Administrative Judge